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THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1997 TERM

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C. W. SMITH, SMITH'S LAKE CORPORATION and

GRADY SMITH, Petitioners,

vs.

GWINNETT COUNTY, GEORGIA, Respondent.

****

On Petition for Writ of Certiorari to the

Supreme Court of Georgia

****

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Although the Petitioners seek to fashion this case as one in which Gwinnett County has taken their property for public use without just compensation, the facts of the case do not support this allegation.

Gwinnett County has never indicated any interest in acquiring the subject property for any purpose. Instead, the Smiths have purchased a property which consists primarily of an existing lake and associated wetlands and have subsequently taken numerous actions to create commercial building pads on top of portions of the wetlands and lake bed. In doing so, the Smiths have breached the existing dam on the property and have created a flood hazard which threatens a community's sole access to their subdivision.

While the Smiths would have this Court believe that the Gwinnett Superior Court has taken their property away from them, the Court's Orders in this case clearly indicate otherwise. After the Smiths completely

ignored the discovery process, and in response to a Motion to Compel Discovery, the Smiths and the County entered into a Consent Agreement whereby the Smiths would repair the Freeman Lake Dam after obtaining direction from a licensed engineer. The Consent Order is important in that it indicates the Smiths' agreement that the repair of the Freeman Lake Dam and the restoration of the Freeman Lake are necessary prior to any further development activities on the property. The Consent Order is also important in that it evidences the County's willingness to allow the Smiths to correct the problem which they created by breaching the dam.

It was only when the Smiths completely disregarded the Consent Order that the

County filed a Motion for Contempt and sought Court intervention in the actual repairs of the dam. Even then, the County had no desire to be burdened with the repairs to the Freeman Lake Dam, and merely requested that the Court sanction the Smiths for failing to abide by their agreement as evidenced by the Consent Order. Many of the Smiths' actions during the pendency of the contempt proceeding, however, resulted in the Court's determination that the Smiths should not be permitted to continue construction activity on the dam. Instead, the Court ordered the County to repair the dam and restore the lake utilizing a bidding process and billing the Smiths for the cost.

While the Smiths have indicated to this Court that they were almost finished repairing the dam when the Court entered its Order, the facts of this case clearly indicate otherwise. Instead of repairing the dam, the Smiths began destroying large mature trees on the side of the property completely removed from the dam. These trees were within a required 75 foot buffer area, and once the trees were knocked down, they could not be replaced. While knocking down the trees, the Smiths took the position that the County's Zoning Resolution concerning such buffer areas did not apply to them. When the County repeatedly served citations upon the Smiths for violation of the buffer, the Smiths literally continued knocking down trees near the officers

serving the citations. The Smiths knocked down large trees within three feet of their property lines, and their actions as observed by the County's employees indicated that the Smiths believed that once the trees were knocked down, their purpose had been accomplished and County Ordinances could not defeat their development scheme.

Not only did the Smiths completely destroy large mature trees in the buffer area, the Smiths dug into the existing grade of the land to remove entire portions of the subject property to a depth of over eight feet. In doing so, the Smiths intentionally ruptured a nearby resident's sewer line leading from her home to the County's sewer main which traverses the Smiths' property. The Smiths openly

contended that although the sewer line had been in place for more than twenty years, the resident did not have the right to maintain a sewer line from her property to the County's sewer main. The Smiths refused to allow County employees to repair the ruptured sewer line or enter onto the Smiths' property during a time in which sewage was overflowing in the resident's home. It is interesting to note that the Smiths ruptured the resident's sewer line the night before the contempt hearing on this matter. The Smiths' actions indicated to the Superior Court Judge that the Smiths were willing to openly defy the Court's Order and would continue to develop the property as they saw fit until someone physically stopped them from doing so. In

fact, during the contempt hearing before the Superior Court the day after the sewer line was ruptured, Grady Smith told the Judge that the Judge could put him in jail, but the Judge could not stop him from knocking down trees on the subject property. During the contempt hearing, another witness testified that when he confronted the Smiths concerning their actions in knocking down trees within the buffer area, Grady Smith stated that he was a multimillionaire and could do whatever he wanted.

Not only did the Smiths completely obliterate the buffer required by County Zoning Ordinances, but the Smiths also destroyed large areas of wetlands surrounding the lake. The Smiths cleared over 800 trees in the area surrounding the

lake, and the Smiths dug trenches in the lakebed and wetlands area which had the effect of removing waters from the wetlands on a continuous basis and channeling it into a small area of the property. The Smiths' activities violated Federal law, and the United States Environmental Protection Agency, at the urging of the United States Army Corps of Engineers, issued an Order requiring the Smiths to cease and desist from their activities, to refill the trenches, and to restore the lake and wetlands areas prior to any further construction efforts. The Smiths completely ignored the Environmental Protection Agency's Order and continued to grade in the wetlands.

The facts of this case reveal property owners who were determined to develop their property in violation of local, state, and Federal regulations and in the face of almost daily citations. The Smiths took the position that they could develop their property as they wished, and they refused to cease development until physically forced to do so. Under such circumstances, the Superior Court's Order incarcerating the Smiths and preventing them from further construction activities on the subject property until the dam and lake were restored was an appropriate exercise of the Court's equitable powers.

Throughout the Smiths' Brief filed with this Court, the Smiths contend that the Superior Court's Order constitutes a permanent physical occupation of the property by the County which denies them of all economically beneficial or productive uses of their land. The facts of this case simply do not bear out these allegations. The Superior Court's Order is clear that the County's sole involvement with the subject property is the repair of the dam and restoration of the lake under close Court supervision. Once the repairs are completed, the Smiths will have the ability to further develop their property as they see fit so long as they comply with local, state, and Federal regulations concerning the development. There is simply no evidence of

any permanent physical occupation of the Smiths' property by the County.

With regard to the Smiths' allegation that the Court's Order denies them all economically beneficial or productive uses of their property, the County submits that the present zoning of the property provides evidence to the contrary. The property is zoned C-2 Commercial and presently has areas adjacent to intersections of Beaver Ruin Road and Plantation Lane, as well as Beaver Ruin Road and Arcadia Drive, where commercial development could have physically occurred prior to the Smiths' draining of the lake. The Smiths' actions after draining the lake evidence a plan to broaden the commercial pads in these areas so as to accommodate additional commercial development on the

land. The Smiths' actions were designed to decrease the size of the lake, drain portions of the surrounding wetlands, and allow access to the commercial pads from additional areas of the property. The Smiths have admitted that they brought in a tremendous amount of dirt from off-site areas. The dirt included busted and discarded concrete, boulders, and other debris. The Smiths used this material to create a flat building pad where a portion of the dam and its spillway once existed. The Smiths' actions to date in broadening the areas where commercial construction activity could occur refute their contention that the Court's Order deprives them of all economically beneficial uses of the land.

Since the property's zoning in the early 1970's, the County has recognized that the property can be put to commercial uses. As the Smiths do so, however, the County merely wishes to exercise its police power to insure that wetlands are not inappropriately destroyed, the flood plain is not encroached upon in violation of Federal law, and that the dam, which must be repaired prior to any commercial construction activity, be repaired in accordance with standard engineering principles. The safety of those who travel daily on the County roadway directly below the dam is the County's paramount concern in this matter. The Smiths' actions in constructing a dam which by all expert accounts to date in this case is inadequate

and unsafe mandates the Superior Court's action in overseeing the construction of a safe dam in the area.

ARGUMENT AND CITATION OF AUTHORITY

Pursuant to Rule 10, this Court does not review Writs of Certiorari as a matter of right but grants such petitions only for compelling reasons. Gwinnett County respectfully submits that the Smiths' Petition for Certiorari does not raise an important question of the type specified in Rule 10 but merely involves a property owner's attempt to develop his property without complying with local, state, and Federal development regulations. As such, the Smiths' Petition for Writ of Certiorari

is inappropriate, and Gwinnett County respectfully requests that this Court deny the Smiths' Petition.

The facts of this case indicate that the Gwinnett County Superior Court was merely dealing with a local development dispute which forced the Superior Court to resort to its equitable jurisdiction. The Superior Court's Order of October 15, 1996, which is set forth on page 10 of the Petitioner's Appendix, provides a concise statement of the facts which led the Court to exercise its equitable jurisdiction. Basically, the Smiths openly defied existing Court Orders, and their actions clearly indicated that if they were permitted to continue construction activities on the

property, damage to the public health, safety, and welfare would result. In light of this fact scenario, the Court exercised its equitable jurisdiction to authorize the County to repair a dam and restore a lake which had been in existence prior to the initiation of this controversy. The Superior Court noted that where equity acquires jurisdiction for any purpose it will retain jurisdiction to give full and complete relief, whether legal or equitable, as to all purposes related to the subject matter. Fuller v. Dillon, 220 Ga. 36 (1964). See also Official Code of Georgia Annotated § 23-1-7. The Trial Court took control of the property to repair the dam and restore the lake, and the Trial Court's action did not work in destruction of the

Defendants' private property without just and adequate compensation. Compare Lamar Advertising of South Georgia, Inc. v. City of Albany, 260 Ga. 46 (1990). When the repairs to the dam and the restoration of the lake occur, the Smiths' property will contain a lake which exists at an identical elevation to the lake which existed prior to this controversy. If the Smiths wish to drain the lake and develop the property in accordance with appropriate regulations, they will be permitted to do so.

This Court has previously recognized that a valid exercise of the police power is ipso facto not a taking requiring payment of compensation. Nollan v. California Coastal Commission, 483 U.S. 825 (107 SC 3141, 97 LE 2d 677) (1987). This Court has also

recognized that a governmental regulation must deny a property owner all economically viable uses of his property in order to require payment of just compensation. See Agins v. Tiburon, 447 U.S. 255 (100 SC 2138, 65 LE2d 106) (1980). In the case at bar, the Petitioners have utterly failed to prove that they have been denied all economically viable uses of their property. To the contrary, the subject property has been zoned for commercial purposes since the early 1970's, and all parties contemplate that the property may be further developed for commercial purposes at some point in the future. Presently, however, the Smiths have violated county, state, and Federal development regulations in attempting to expand the commercial building pads on the

property at the expense of Federally protected wetlands.

CONCLUSION

Gwinnett County respectfully submits that the Superior Court's Order finding the Smiths in contempt for failure to abide by a Consent Order requiring the repair of the Freeman Lake Dam and the restoration of Freeman Lake does not rise to the level of a controversy which merits this Court's consideration on a Petition for Writ of Certiorari. The Trial Court merely exercised its equitable powers to ensure that the existing structures on the subject property are properly repaired so as not to endanger the public health, safety, and

welfare due to a potential breach of the dam and associated flooding. The Superior Court has not limited the Smiths' ability to construct a commercial structure or structures of their choice on the property. The Smiths have recognized that the dam must be repaired and the lake restored prior to such development as evidenced by the Consent Order by the parties dated March 25, 1996 and incorporated in the Petitioners' Appendix at page 21.

WHEREFORE, Gwinnett County respectfully requests that the Smiths' Petition for Writ of Certiorari by denied.

(SIGNATURE PAGE FOLLOWS)

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